No. 15932

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. ELLE CONSTRUCTION CO., a corporation and ST. PAUL-MERCURY INDEMNITY CO., a corporation,

Appellants.

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation,

Appellee.

Reply Brief of Appellants

Appeal from the United States District Court for the District of Idaho, Eastern Division

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STATEMENT OF FACTS

Because we believe that the appellee has, in its Statement of Fact, enlarged upon and exceeded the facts found in the record in one main part, we present herewith a short Reply to the appellee's Statement of Facts. We must take issue with appellee's Statement of Fact found on Page 4 of its Brief, wherein it is stated that the Amended Complaint of the plaintiffs in the State Court action alleged that the truck operated by Horsley was being operated by him with the

permission and consent of William S. Gagon and that such allegation was denied by C. H. Elle Construction Company in that suit. The record is clear on this point. At R. 153, the Second Amended Complaint of the plaintiff in the State Court action is set out. Paragraph IV thereof is as follows:

> "That at all times mentioned herein, defendant, William S. Gagon, was the owner of a 1954 Chevrolet Truck bearing a 1954 Idaho license 3C 1010; that at such times, *the defendants, M. Burke Horsley and Max Larsen, were operating such truck with permission and consent of the owner,* William S. Gagon."

C. H. Elle Construction Company answered that allegation as follows:

> "Answering Paragraph IV of said Second Amended Complaint, this answering defendant admits that William S. Gagon was the owner of a 1954 Chevrolet Truck bearing 1954 Idaho license plates 3C 1010, but denies each and every other allegation contained in said paragraph." (R. 167-168).

Denial was that both Horsley and Hansen were using the truck with permission.

Another fact that should perhaps be pointed out is that the present suit in the Federal Court was commenced September 19, 1955 (R. 7), slightly less than a full month

before any Answer was filed in the then pending State Court proceedings. (R. 171).

ARGUMENT

The first two points considered by appellee in its Brief deal with the question of whether or not the trial court was correct in holding that the State Court Judgment relative to use of the vehicle was conclusive in this action. It is the appellant's position that the parties were not the same, the issues were not the same, and the parties herein were not adversary parties in the State Court. The question of permissive use under the wording of the insurance contract issued by Western Casualty and Surety Company is a different issue than the one presented in the State Court, which was permissive use under Section 49-1404, Idaho Code. C. H. Elle Construction Company was a co-defendant with Gagon, insured by Western Casualty & Surety Company, in the State Court. It was not possible for the question of policy coverage to be litigated in that court action. Stearns vs. Graves, 61 Idaho 232, 199 P. 2d 955. One of two defendants who are involved in an automobile accident and sued thereon, may not, in a cross complaint, litigate any question between the two defendants. Liebhauser vs. Milwaukee Elec. R. & Co., 193 N. W. 522 (Wisc.). No counterclaim could have been brought (Idaho Code Section 5-613) no cross-complaint could have been brought (Idaho Code Section 5-617; Liebhauser vs. Milwaukee Elec. R. & Co., 193 NW 522 (Wisc.)), and no third party interpleader is allowed. The action was tried on the pleadings of Mary Lou Campbell over which the appellants herein had no control. There was

no adversary pleadings and there could not have been; the liabilities as between C. H. Elle Construction Company and the insuror of Gagon were not presented; the evidence available with Western Casualty & Surety Company as a defendant, to-wit: Admissions against interest and actions between Gagon, Horsley and the representatives of Western Casualty & Surety Company, were incompetent and inadmissable in the State Court proceedings. C. H. Elle Construction Company had no standing to perfect an appeal to the supreme court of the State of Idaho relative to the ruling on permissive use as between Campbell and Gagon.

That the pleas of res judicata or collateral estoppel are not available for the appellee in this action is clearly shown in the recent case of Hinchey vs. Sellers, (N. Y.) 172 N. Y. S. 2d 47 (1958). In that case, one Orville Sellers owned an automobile which was insured by the National Surety Company and the insurance policy contained the standard "omnibus clause." Orville Sellers granted permission to his son, Donald, to use the vehicle and Donald in turn granted a limited permission to a third party, O'Rourke. O'Rourke, while allegedly exceeding his permission, was involved in an accident. An action was brought by the administrator of the estate of a person killed in the accident against O'Rourke. The insurance company declined to defend the action and a declaratory judgment suit resulted wherein it was held that there was no permission under the terms of the policy and hence, the insurance company was not obligated to conduct a defense. Thereupon the present action against O'Rourke and Donald Sellers was commenced in New York

alleging that the automobile was being used by O'Rourke with "the permission, express or implied," of the defendants under the New York permissive use statute.

Syllabus No. 1 is as follows:

> "Where issue in New Hampshire action against driver of automobile and liability insurer was whether use of automobile at time of accident was within permission of insured within omnibus coverage clause of liability policy and issue in instant action against owners of automobile was whether at time of accident automobile was being operated with permission of owner within New York statute making owner liable for negligent acts of third person driving automobile with owner's permission, such issues were not the same, and consequently determination in New Hampshire action was not res judicata in instant action."

Syllabus 4:

> "The doctrine of collateral estoppel is not applicable to evidentiary findings made in a prior action involving a different ultimate issue."

Syllabus 5:

> "Prior New Hampshire declaratory judgment that automobile liability insurer was not required to defend action against third person driving automobile

when passengers were killed in that automobile was not being used with permission of insured within omnibus coverage clause of policy did not estop plaintiffs suing owners for deaths of some passengers from relitigating the underlying evidentiary questions bearing upon the ultimate issue of whether the automobile was being used at time of accident with permission of owner within New York statute making owner liable for negligent acts of third person driving automobile with permission of owner."

And on page 50:

"Two questions are presented upon this appeal: (1) whether the issue of permission of the insured under the policy which was decided in the New Hampshire action, is the same as the issue of permission of the owner under the New York statute, so that the determination of that issue in the New Hampshire action is binding in the present action. (2) Even if the ultimate issue is not the same, whether the evidentiary findings by the New Hampshire court are binding in the present action, so that, upon the basis of those findings, it may be summarily determined that the automobile was not being used with the permission of the owner at the time of the accident, within the meaning of the New York statute."

"There can be little doubt but that the answer to the first question must be in the negative.

"* * * It is clear in this case that the issue in the New Hampshire action was not the same as that in the present action. Even though the word 'permission' appears both in the insurance policy and in the statute, the word did not necessarily have the same legal meaning in the two contexts. The question of the meaning of the word in the policy was to be determined as a matter of contract law in accordance with the intention of the parties to the contract under the law governing the contract. The meaning of the word 'permission' in the New York statute must be determined in accordance with the intent of the Legislature, taking into account the policy objectives which the Legislature sought to carry out."

In answering the second question, the Court, on page 53, states:

"However, we believe that the doctrine of collateral estoppel is not applicable to evidentiary findings made in a prior action involving a different ultimate issue. In our opinion, the public policy back of the doctrine of res judicata and collateral estoppel is given sufficient effect if relitigation of the same ultimate issue is barred. To bar the relitigation of underlying evidentiary questions, simply because findings were made upon them in a prior action involving a different legal issue, would go too far. If the issue of ultimate fact is not the same in the two actions, frag-

> mentary findings of evidentiary fact in the first action ought not to be pulled out of the adjudication and made independently binding. Collateral estoppel should properly be restricted to ultimate facts."

See also: Mazzilli vs. Accident and Casualty Insurance Co. (N. J.) 139 A. 2d 741 (1958).

It should be kept in mind that in the above quoted case of Hinchey vs. Sellers, the same plaintiff brought both actions and had control of the evidence to be adduced for the party having the burden of proof.

Appellee cites several cases to support its position. In the Lopopolo case, Page 8 of Appelle's Brief, the facts involved show that one Donato sued the owner of a vehicle, John Lopopolo, and the son of the owner, Jack Lopopolo, for damages arising from an automobile collision, alleging that the son was operating the vehicle with the permission of John Lopopolo and that the accident was due to the negligence of the son. Maryland Casualty Company, the appellant, in that case, carried the insurance coverage for John Lopopolo and defended the suit on behalf of both defendants. There was a direct conflict in the evidence based upon the pleadings as to whether Jack Lopopolo was operating the vehicle and the jury held that he was. Thereafter, John Lopopolo brought suit against the Maryland Casualty Company to recover the amount of the judgment in the prior suit. The Court held that the judgment obtained in the state

court was on the basis that Jack Lopopolo was operating the vehicle which was the exact question involved in the second suit and was therefore final. This case, we submit, is not controlling herein because (1) the question of fact—that is, who was the operator—was fully presented and tried out pursuant to the pleadings, while in the present case question of permission under the terms of the insurance contract was never presented nor could it have been presented; (2) the exact question of who was driving was decided in an adversary proceeding, with the appellant in the later federal court case being one of the adversaries, while in the case at bar, the present point was never litigated as between adversary parties and the present appellants had no opportunity to litigate it; (3) The question of fact,—that is, who was the operator,—was decided on all of the evidence and the evidence was presented by the insurance company as it controlled the defense, while in the present action the evidence of the question of permission was presented by and adduced by plaintiff in the state court case and not the C. H. Elle Construction Company. In addition, evidence of the contractual relationship rising between the appellants and appellee herein could not have been presented in the state Court.

Appellee cite the case of Williams Estate, 223 P. 2d 248, Page 13 of Appellee's Brief, as apparent authority for its proposition that collateral estoppel can be asserted in this action. In the Williams Estate case, a prior default divorce had not presented the question of community property of the present petitioner and her deceased ex-husband, therefore the petitioner, being the surviving ex-wife, was held not

to be foreclosed from presenting the question during the probate proceedings of the deceased ex-husband's estate. We submit that this is authority for the proposition that collateral estoppel is not available respecting a question which might have been but was not litigated in an original action. Even further than this, however, the question presented in this appeal is the question of the interpretation of the contract of insurance which was never in issue in the state court. There is, therefore, no room for the theory of collateral estoppel.

It is submitted that the Loomis case cited by appellee on Page 15 of its Brief is based upon a rule foreign to the facts involved in this appeal and is, therefore, not in point.

It is submitted that the basic theories developed in the case of Hinchey vs. Sellers, cited above, are controlling herein, to-wit: That the question of permission within the omnibus clause of the liability insurance policy is foreign to and different from the question of permission within the meaning of the permissive use statute, that the doctrine of collateral estoppel is not applicable where there is involved a different ultimate issue.

The questions presented on Pages 16-19 of Appellee's Brief deal with the question of permission under the terms of the policy. Appellee cites no cases except the Goodman case, which, we submit, can be of no comfort to the Appellee as it is based upon a different type of policy which expressly stated that the omnibus feature was not applicable

to the person involved. This is not the situation herein. Appellants refer to the cases and the discussion in their original Brief relative to permission. None of the cases cited therein have been distinguished, controverted or opposed by the appellee in its Brief.

On Pages 19-23 of its Brief, the Appellee presents a discussion of a proposition that any liability of Gagon would have to be predicated upon the permissive use statute of the State of Idaho, Idaho Code 49-1404. This discussion completely misses the purpose of the omnibus clause and is beside the point. Appellants herein are not suing Gagon and are not attempting to fix liability upon Gagon by virtue of a state statute of permissive use of an automobile. On the contrary, appellants are suing the Western Casualty & Surety Company on the contract of insurance issued by it, which, we submit, makes the appellant herein insureds under the policy. This is a suit in contract against what is in effect appellants own insurance company and is not a suit in tort against the owner of an automobile. This is clearly brought out in the case of Hinchey vs. Sellers cited above, Pleasant Valley Lima Beans & Warehouse Ass'n vs. Cal-Farm Insurance Company (Cal.), 298 P. 2d 109, cited in Appellants original Brief, and Leach vs. Farmers Automobile Inter-Insurance Exchange, 70 Idaho 156; 213 P. 2d 920. The argument advanced by appellee under this heading shows a complete misconception of the fundamental issues involved in this suit. Idaho Code, Section 49-1404 is completely inapplicable. Furthermore, the Anneker Case cited on Page 22 of Appellee's Brief is, according to our understanding of

that case, completely foreign both to the issues in this case and to the issue presented by appellee. In that case, a school district in the State of Idaho along with the adjoining landowner was sued for damages for the death of a child by drowning. The Court held that the school district is immune to tort action. Appellants therein asserted a further ground against the school district upon the theory that a liability insurance policy written in favor of the district waived the governmental immunity. The court pointed out that such policy was an automobile liability policy taken out by the school district pursuant to a state statute requiring insurance with respect to the operation of a transportation system, under Idaho Code 33-801. This statute also contained a provision that the insurance company should not be entitled to the defense of governmental immunity of the insured. It is submitted that this case is beside the point.

The question of whether or not the actual use of the vehicle comes within the terms of the policy is apparently presented on Page 23 of Appellee's Brief. The policy states, under Item 5, as follows:

> "Use: The purpose for which the automobile is to be used are 'Commercial Class 5 CA' * * * The term 'commercial' is defined as used principally in the business occupation of the named insured as stated in Item I, *including occasional use for personal pleasure, family, or other business purposes.*" (R. 51).

The policy, then, on its face, contemplates that the ordinary

use for the 1954 Chevrolet Truck involved in this action shall be in the business occupation of William S. Gagon but the policy expressly provides that coverage is granted if the vehicle is used occasionally for personal purposes, pleasure, family, or other business purposes of the insured. It is submitted that this clearly includes the use for which the truck was being operated on the day of the accident in this litigation.

The question raised is completely answered, we submit, by the testimony of Mr. William S. Gagon. (R. 128):

> "Q. Was any amount subsequently paid to you for the damage to the truck?
>
> "A. Yes.
>
> "Q. By the Western Casualty and Surety Company?
>
> "A. Yes, sir."

The Western Casualty and Surety Company paid the collision portion of this very policy. When dealing with Mr. Gagon, no question was raised by the insurance company as to improper use which, if a defense in a case at bar, would have also been a defense to the payment of the collision claim to Mr. Gagon. Instead, the Western Casualty and Surety Company admitted their liability, admitted that the use was within the policy provision and paid the collision portion of their obligation.

In the case of Terrasi vs. Peirce, 23 N. E. 2d 871, (Mass.), in speaking of the problem of commercial use under a policy, the Court, on Page 873 states as follows:

> "In the present case, the policy declared merely that the purposes for which the truck is 'to be used are: Commercial.' The intended use was in truth commercial. The regular, habitual and dominant use was also commercial. Any other use was sporadic and occasional. So far as is shown, the use made at the time of the injury would not increase the risk or change the premium classification. To interpret the words used as implying either a warranty or a condition that the truck would never be used for any other purpose, would have for an insured person unfortunate consequences not required, so far as we can see, by any consideration of the situation of the insurer."

The case of Birnbaum vs. Jamestown Mutual Ins. Co., 83 N. E. 2d 128 (N. Y.) presents the situation very similar to the facts at bar. In this case, the occupation of the named insured was designated as "Delivery of Coal—Hudson Fuel Co." The truck involved was coded as "B" and Item 5 of the policy stated that "B" indicated "Commercial" use and defined commercial use as follows:

> (b) "The term 'Commercial' is defined as use principally in the business occupation of the named insured as stated in Item I, including occasional use for

personal pleasure, family and other business purposes.' * * *''

The actual use of the vehicle in the collision in the Birnbaum case was transporting some lumber for a friend and the Court, on Page 130 states:

"However, plaintiff contends and has submitted affidavits alleging facts which, if proved, establish that the truck was principally used to transport coal for the Hudson Fuel Company and that the use at the time of the accident was merely 'occasional use.' In his own affidavitt De Lillo stated:

"On the date of the accident, deponent was requested by a friend, one Harry Watson, to transport some lumber from Yonkers, New York to the Botanical Gardens, Prospect Park, Brooklyn, New York. In compliance with this request, deponent instructed his driver and employee, Archie Spence, to make the delivery of said lumber. * * *''

"* * * This was the first occasion on which this truck was used for any purpose such as above described. On the day previously, it had been used to haul coal for the Hudson Fuel Co. and for about a year and a half before the accident, it was exclusively used daily for the purpose of hauling coal for the Hudson Fuel Co. However, on the day of the occurrence, there was no coal to be hauled by this truck. * * *''

> "In his brief plaintiff admits, as alleged in one of the defendant's affidavits, that Watson paid De Lillo '$3.00 an hour for 7 hours or a total of $21' on this occasion. If it be proved, therefore, that the use by Watson was an 'occasional use' made by DeLillo, the fact of payment indicated that hauling for Watson was an occasional 'business' purpose within the terms of the policy or a court of jury might so find."

Gagon submitted a bill for the use of the truck, and it was paid by C. H. Elle Construction Co. (R. 113-114; 122.)

Appellee attempts, on pages 24-25, to avoid the effect of the S. R. 21 which the duly authorized agent of the appellee signed under oath. In discussing the effect of the filing of the S. R. 21, appellee, on Page 25 of its Brief, states:

> "We think a different situation would apply were the contest between the insured and his own company. In such case, it is conceivable that a company would be estopped to deny coverage where they had filed S. R. 21 on behalf of their insured * * *"

This is exactly the situation here. The company did file the S. R. 21 on behalf of its insured. By virtue of the omnibus clause, Horsley, and through him, C. H. Elle Construction Company, as being legally responsible for the acts of Horsley, became an insured of the Western Casualty and Surety Com-

pany. As pointed out in 5A American Jurisprudence 89, Section 91, automobile insurance::

> "Such a person other than the named insured, while using the motor vehicle for the purposes for which it is insured, and within the scope of the permission granted, becomes an 'additional insured' by virtue of the "omnibus clause" the same as if he were named as an insured in the policy. Upon the happening of an accident while the insured vehicle is being operated by a qualified additional insured, with the permission of the owner, the insurance as to him becomes an independent liability—that is, independent of the insurors responsibility to the named insured."

The case of Leach vs. Farmers Automobile Inter-Insurance Exchange, 70 Idaho 156; 213 P. 2d 920, cited in Appellants original brief, adopts the same theory.

Idaho Code Section 49-1511, relied upon the appellee on Page 24 of its Brief, does not prohibit the consideration of the S. R. 21. By its very words, the Section provides only that the S. R. 21 shall not "be referred to in any way nor be any evidence of the negligence or due care of either party at the trial of any action at law to recover damages." In other words, the S. R. 21 is not evidence of negligence or due care in a tort action for damages between the parties involved in a collision. This section, we submit, by its clear wording and purpose, contains no prohibitions respecting

the use of S. R. 21 as an admission against interest in a suit against the insurance company by an insured.

An interesting sidelight is that this section did prohibit the use of the S. R. 21 in the state court action in Campbell et al vs. Elle et al. In other words, evidence of permissive use under the wording of the insurance contract, was and had to be different than the evidence under the tort action. It is submitted that the case of Behringer vs. State Farm Mutual Automobile Insurance Company, 82 N. W. 2d 915, relied upon by the appellants in their original Brief, is well reasoned, and presents the law applicable in the instant case.

CONCLUSION

The policy issued by Western Casualty and Surety Company to William S. Gagon, designated as an insured thereunder any person using the vehicle or any person or any organization legally responsible for the use providing the actual use of the vehicle was with the permission of the named insured. It is submitted that this policy constitutes C. H. Elle Construction Company as an also insured and the appellants herein were entitled to all of the protection and the contractual obligations set forth in said policy. It is unquestioned that M. Burke Horsley, employee of one of the appellants herein, operated the vehicle covered by Western Casualty and Surety Company when he was involved in a collision, the end result of which was a judgment against appellants herein in the amount of $15,000.00, plus

costs. It is submitted that under the facts submitted in this record, M. Burke Horsley had permission under the interpretation of the insurance policy to use the vehicle, that there was an absolute and undenied acquiescence by the named insured, that the actual use of the vehicle came within the terms of the policy. It is submitted that the appellant, C. H. Elle Construction Company was, in all respects, an insured under said policy.

It is the position of the appellants that Judgment should be rendered for and on behalf of the appellants for the total sum of $13,630.93, plus interest, plus costs of action.

Respectfully submitted:

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